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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance, "especially heinous, atrocious, or cruel" in an unconstitutionally overbroad manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim when it reviews death sentences in which that aggravating circumstance has been found.

2. Whether the finding by a federal court on constitutional grounds that the aggravating circumstance, "especially heinous, atrocious, or cruel" was invalid, requires the death sentence to automatically be vacated despite the fact that another valid aggravating circumstance has been found by the jury.

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The Petitioner, the State of Oklahoma, and the Attorney General of Oklahoma, Robert H. Henry (hereinafter referred to as the "State"), pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals from which certiorari is sought is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc). This opinion was filed on June 22, 1987 (App. A). This decision vacated the opinion of the original three judge panel, which had affirmed the denial of Cartwright's (hereinafter referred to as the "Defendant") petition for a writ of habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The en banc opinion reversed the order and judgment of the United States District Court for the Eastern District of Oklahoma, Cartwright v. Maynard,

86-54-C (E.D. Okla. filed Feb. 11, 1986) (App. B).

The opinion of the Oklahoma Court of Criminal Appeals in the post-conviction appeal in this case is at Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985) (App. C), cert. denied, 106 S.Ct. 837 (1986), which affirmed the findings of fact and conclusions of law of the District Court of Muskogee County in State v. Cartwright, No. CRF-82-192 (filed Aug. 26, 1985) (App. D).

The opinion of the case on direct appeal is reported as Cartwright v. State, 695 P.2d 548 (Okla. Crim. App. 1985), cert. denied, 473 U.S. 911 (1985) (App. E).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

Okla. Stat. Ann. tit. 21, § 701.7 (West 1983) states:

> A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.
>
> B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.
>
> C. A person commits murder in the first degree when the death of a

> child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Okla. Stat. Ann. tit. 21, § 701.9 (West 1983) states:

> A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.
>
> B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) states:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the

> defendant and the state, of if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. Ann. tit. 21, § 701.11 (West 1983) states:

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it

> unaniously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.12 (West 1983) states:

> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
>
> 2. The defendant knowingly created a great risk of death to more than one person;
>
> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty.

Okla. Stat. Ann. tit. 21, § 701.13 (West 1983) (since amended) stated:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the enitre record and transcript to the Oklahoma Court of Criminal Appeals together

with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Okla. Stat. Ann. tit. 21 § 701.13 (West 1983) (since amended).

The Defendant then filed a petition for writ of certiorari with the United States Supreme Court, on July 1, 1985 this Court denied the petition. Cartwright v. Oklahoma, 473 U.S. 911 (1985). Next, the Defendant filed an application for post-conviction relief in the District Court of Muskogee County, and that application was denied by the district court on August 26, 1985 (App. D).

The Defendant then appealed the denial of this application for post-conviction relief to the Oklahoma Court of Criminal Appeals, which unanimously affirmed the denial of the post-conviction application. Cartwright v.

State, 708 P.2d 592 (Okla. Crim. App. 1985) (App. C).

On January 13, 1986 this Court denied the Petitioner's second petition for a writ of certiorari. Cartwright v. Oklahoma, 106 S.Ct. 837 (1986).

On February 6, 1986, the Petitioner filed a petition for writ of habeas corpus in the United States District court for the Eastern District of Oklahoma. On February 11, 1986 that court denied the petition (App. B).

The Defendant then appealed the denial of his petition for writ of habeas corpus to the United States Court of Appeals for the Tenth Circuit. The original three judge panel affirmed the denial of the Defendant's Petition for Writ of Habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

However, the Circuit granted rehearing en banc, and on June 22, 1987, the entire panel issued an opinion in which it reversed the denial of the Defendant's petition as to the sentencing stage of the Defendant's trial. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987).

The court held that the Oklahoma Court of Criminal Appeals had failed to apply a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." The court stated that the state appellate court's construction of this aggravating circumstance did not genuinely narrow the class of murders to which the death penalty was to be applied, in violation of Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420

(1980). 822 F.2d at 1491 (App. A., at 71).

The court also held that since juries in Oklahoma weighed aggravating and mitigating circumstances, and since the Court of Criminal Appeals did not conduct an independent reweighing on appeal when an invalid aggravating circumstance had been found, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was not applicable. The court in Cartwright stated that the overbroad construction of the aggravating circumstance "especially heinous, atrocious, or cruel," required that the death sentence be invalidated, despite the fact that the jury found the existence of another aggravating circumstance, that the Defendant knowingly created a great risk of death to more than one person. Cartwright v.

Maynard, 822 F.2d at 1481-83. The court held that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." Id. at 1483; (App. A, at 28).

REASONS WHY THE WRIT SHOULD BE GRANTED

PROPOSITION I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, WHICH HELD THAT THE OKLAHOMA COURT OF CRIMINAL APPEALS APPLIED THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN OVERBROAD MANNER, CANNOT BE RECONCILED WITH INTERPRETATIONS OF THIS AGGRAVATING CIRCUMSTANCE BY THE FOURTH, FIFTH, AND ELEVENTH CIRCUITS.

In the present case, reported as Cartwright v. Maynard, 822 F.2d 1477,

1471 (10th Cir. 1987), the Tenth Circuit held that the Oklahoma Court of Appeals had not applied a constitutionally required narrowing construction to the aggravating circumstances "especially heinous, atrocious, or cruel."

The jury in Cartwright was given the following definition of "especially heinous, atrocious, or cruel:"

> As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

The instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), a case referred to in Proffitt v. Florida, 428 U.S. 242, 255 (1976).

The Tenth Circuit in the present case noted that because the Oklahoma Court of

Criminal Appeals, in reviewing cases in which that aggravating circumstances had been found, has held that either the attitude of the killer, the manner of the killing, or the suffering of the victim can be used to uphold a jury finding that this aggravating circumstance existed. The Tenth Circuit ruled that the Oklahoma court had not interpreted the aggravating circumstance in a way that genuinely narrowed the class of persons subject to the death sentence. 822 F.2d at 1488-91 (App. A, at 67-71).

The State contends that this ruling conflicts with that of the Eleventh Circuit in Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 106 S.Ct. 1993 (1986). In that case (which involved a victim who died from loss of blood caused by several

knife wounds[1]), the Eleventh Circuit noted:

> [The petitioner's] charge that the phrase "especially heinous, atrocious or cruel" is unconstitutionally vague has been decisively repudiated by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 247, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976).

The opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance "especially heinous, atrocious, or cruel" must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered in determining whether the murder in question fit the definition. See Cartwright 822 F.2d at 1488-90. The

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[1]See Booker v. State, 397 So.2d 910, 912 (Fla. 1981).

court also criticized the Oklahoma court for allowing reliance on all of the circumstances of the crime in determining whether the murder was "especially heinous, atrocious, or cruel." Id. at 1490 ("inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense"), and at 1491 ("Consideration of all of the circumstances is permissible; reliance upon all of the circumstances is not.").

If there is a constitutional distinction between "consideration" and "reliance" in this context, it is one that is not understood by the State.

In Turner v. Bass, 753 F.2d 342, 352 (4th Cir. 1985), rev'd on other grounds sub. nom. Turner v. Murray, 106 S.Ct.

1683 (1986), the Fourth Circuit upheld the death sentence in a case where the petitioner (who was convicted of shooting a store owner with a handgun), and rejected his challenge to the aggravating circumstance in question, that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. While noting that the Supreme Court of Virginia, applying Godfrey v. Georgia, 446 U.S. 420 (1980), had adopted a requirement that the murder involve either torture or "aggravated battery," the Fourth Circuit stated that the facts of the murder in Turner "was cold-blooded and calculated, involving no emotional trauma as was present in Godfrey." In other words, the court

reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was identical to the review conducted by the Oklahoma Court of Criminal Appeals in the present case.

In addition to the fact that the Fourth Circuit relied upon the attitude of the killer in upholding the death sentence, the State in the present case also points out that the requirement of an "aggravated battery" does not necessarily make the aggravating circumstance less vague. Any murder committed with a knife or a firearm arguably involves "aggravated battery" to the victim. Certainly it could be argued that the victim in the present case, Hugh Riddle, was a victim of an "aggravated

battery" since he was shot twice with a shotgun.

Nor is there any noticeable difference between the death of Hugh Riddle and the victim in Turner v. Bass, 753 F.2d at 344, 352-53. The petitioner in **Turner** shot the victim in the head with a handgun and then shot him again twice as he lay "still living, helpless and 'gurgling.'" Presumably he was unconscious, since the opinion states that only a witness pleaded with the petitioner not to shoot anyone else, and the opinion of the Supreme Court of Virginia in that case states that the store owner was shot in the temple. Turner v. Commonwealth, 273 So.2d 36, 39 (Va. 1980). Since the victim was rendered unconscious by the first

gunshot, it is obvious that he was not a victim of torture.

Furthermore, other cases have upheld the aggravating circumstance "especially heinous, atrocious, or cruel when the victim suffered only psychological torture. See, e.g., Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987) (victims were executed by being shot one by one in the head in the presence of the others). See also White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987) (the aggravating circumstance, "especially heinous, atrocious, or cruel, was properly applied to a participant in the Francois murders who was opposed to the executions).

In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987) the court upheld the finding by the federal district court

that the aggravating circumstance "especially heinous, atrocious, or cruel" was properly submitted to the jury without a limiting instruction and without sufficient evidentiary support from the facts in the case. See also Evans v. Thigpen, 631 F.Supp. 274, 284-85 (S.D. Miss. 1986). The facts in Evans reveal that the victim was shot in the head as he knelt motionless behind a store owner during a robbery. Id. at 284; Evans v. State, 422 So.2d 737, 739 (Miss. 1982). The federal district court stated (using reasoning that was later adopted by the Fifth Circuit, 809 F.2d at 241):

> In such circumstances, the mental anguish and psychological torture suffered by the victim prior to the infliction of the death-producing wound may be considered with respect to the "heinous, atrocious or cruel" factor and make its application constitutionally

unobjectionable. Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984).

631 F.Supp. at 285.

Certainly the victim in the present case, Mr. Riddle suffered the same mental anguish as did the victim in Thigpen.

Furthermore, making physical suffering an aspect of "especially heinous, atrocious, or cruel" would mean that there has been a narrowing of the class of persons eligible for the death sentence strictly for its own sake. There is no rational basis for prohibiting a State from imposing the death sentence upon a defendant who has killed in a manner that causes the victim to die immediately. The requirement that a victim suffer physical pain before this aggravating circumstance has been met would mean that in many cases if the

killer is a poor marksman whose gunshot did not cause immediate death, he or she would be a candidate for the death sentence, while a good marksman would escape the death sentence because his or her victim was killed immediately.

This distinction could also mean that someone who killed by stabbing with a knife, see, e.g., Palmes v. Wainwright, 725 F.2d 1511, 1523-24 (11th Cir. 1984), cert. denied, 469 U.S. 873 (1984), would be a candidate for the death sentence, while those who used firearms would not. Those killers who use firearms should not receive the special protection this distinction would breed.[2]

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[2] Significantly, all four Presidents of the United States who have been assassinated have died as a result of gunshot wounds (Lincoln, Garfield, McKinley, and Kennedy).

The requirement that the aggravating circumstance in question be limited by such a restrictive definition would result in an inappropriate intrusion into the substantive punishment imposed upon murderers by the States. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (the Court notes that it has traditionally "deferred to the State's choice of substantive factors relevant to penalty determination.").

Finally, another sentencing standard that is at least as vague has been upheld by this Court. See Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983) (prediction of future dangerousness is an acceptable criterion for an aggravating circumstance).

PROPOSITION II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FINDING OF AN INVALID AGGRAVATING CIRCUMSTANCE BY A FEDERAL COURT AUTOMATICALLY REQUIRES THE DEATH SENTENCE TO BE INVALIDATED EVEN IF ANOTHER VALID AGGRAVATING CIRCUMSTANCE HAS BEEN FOUND BY THE JURY.

In the present case the Tenth Circuit invalidated the death sentence based on Oklahoma's failure to adopt what the Tenth Circuit believed was a constitutionally required limitation on the definition of the aggravating circumstance "especially heinous, atrocious, or cruel." This was done despite the finding by the jury of another aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person.

In Zant v. Stephens, 462 U.S. 862, 890 (1983) the Court stated:

> Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

In the present case the Tenth Circuit answered this question by holding that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." 822 F.2d at 1483.

The Tenth Circuit held that the present case was different from Zant because Oklahoma's death penalty scheme requires the sentencer to "weigh" aggravating against mitigating circumstances, whereas under Georgia law

there is no requirement that aggravating circumstances be balanced against mitigating circumstances. Id. at 1479.

The distinction between those two types of sentencing processes was noted by this Court in Barclay v. Florida, 463 U.S. 939, 954 (1983). In Barclay, however, in his concurring opinion Justice Stevens noted that "[t]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. at 967.

In the present case the evidence supporting the aggravating circumstance "especially heinous, atrocious, or

cruel," was directly related to the character of the defendant and the circumstances of the crime. Furthermore, the instruction did not enumerate what the mitigating circumstances would be, merely stating that "[t]he determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case" (R. 207). See also Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) (mitigating circumstances are not enumerated). Cf. Barclay v. Florida, 463 U.S. at 962-63 (Stevens, J. concurring) (aggravating circumstances are weighed against "statutorily enumerated mitigating circumstances").

Therefore, the State contends that the finding of the aggravating circumstance, that the defendant

knowingly created a great risk of death to more than one person, in addition to the allegedly invalid one involving the "especially heinous, atrocious, or cruel" standard, was a sufficient "individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. Cf. Lowenfield v. Phelps, 817 F.2d 285, 288-89 (5th Cir. 1987), cert. granted, 107 S.Ct. 3227 (1987) (single aggravating circumstance that merely repeated an element of the crime sufficiently narrowed the class of persons eligible for the death sentence).

In Welcome v. Blackburn, 793 F.2d 672, 677-79 (5th Cir. 1987), a Louisiana case, the prosecutor argued and presented evidence on only one aggravating circumstance (that the defendant

"knowingly created and risk of death or great bodily harm to more than one person") and the trial judge read the entire list of aggravating and mitigating circumstances to the jury. The jury found the existence of the one argued by the prosecutor, and also found that the killing was "committed in an especially heinous, atrocious, or cruel manner." The Fifth Circuit held:

> Where the jury finds at least one aggravating circumstance that was valid and supported by the evidence, this Court has ruled that the refusal to review the validity of additional aggravating circumstances found by the jury is permissible as long as the jury's finding of arguable invalid aggravating circumstances "affected none of petitioner's substantial rights." Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982).

793 F.2d at 678. The court also stated:

> Welcome asserts that the jury's unwillingness to impose the death penalty for the murder of

> Maturin demonstrates that they imposed the death penalty for his killing of Guillory based solely upon a finding of heinousness. Under State v. Culberth, 390 So.2d 847 (La. 1980), the aggravating circumstance of heinousness is satisfied only if the killing involves torture or the pitiless infliction of unnecessary pain on the victim. Welcome asserts that there was no proof that would satisfy this standard. Assuming this is so, we find that the clear proof of the first aggravating circumstance - the killing of two persons in a consecutive course of conduct - is sufficient to demonstrate that the jury finding of heinousness was harmless error.

793 F.2d at 678 (footnote omitted).

In Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 106 S.Ct. 2259 (1986), the court, in rejecting a defendant's contention that, since the Louisiana Supreme Court had previously held that one of the aggravating circumstances was unconstitutionally vague, the death sentence in his case must also be invalidated, stated:

> David, however, is readily distinguishable from the instant case. In David, "a significant prior history of criminal activity" was the sole aggravating circumstance found by the jury. Here, the jury found two other aggravating circumstances supporting their recommendation of the death sentence. It is now settled law that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."

(Emphasis original.) See also Williams v. Maggio, 679 F.2d 381, 386-90 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (death sentence properly upheld where Louisiana Supreme Court reviewed only one of the three aggravating circumstances found by the jury).

These cases are significant because under Louisiana's capital punishment scheme, the jury weighs the aggravating circumstances against mitigating

circumstances when determining whether to impose the death sentence. See State v. Willie, 410 So.2d 1019, 1033 (La. 1982) appeal after remand, 436 U.S. 1019 (1984) where the court stated:

> Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. State v. Sonnier, 402 So.2d 650, 657 (La. 1981).

See also State v. Knighton, 436 So.2d 1141, 1158 (La. 1983), cert. denied, 465 U.S. 1051 (1984).

These pronouncements seem to be contradicted by those of the Fifth Circuit in Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987), which stated that Louisiana law does not require weighing of aggravating against

mitigating circumstances. This statement was supposedly based on review of the Louisiana sentencing statute, La. Code Crim. Pro. Ann. 905.3 (West 1986) and the court's reading of several Louisiana cases.

The above-mentioned sentencing statute states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

(Emphasis added.)

Obviously the jury is engaged in a weighing process if it considers both the aggravating circumstance it has found and then imposes sentence, and the question of whether the jury either "weighed" or "considered" each is basically a matter of semantics. See also Gray v. Lucas,

677 F.2d 1086, 1106 (5th Cir. 1982), on rehearing, 685 F.2d 139 (5th Cir. 1982), cert. denied, 463 U.S. 1237 (1983) (under Mississippi law the jury weighs aggravating against mitigating but may still sentence the defendant to life even if aggravating circumstances outweigh mitigating circumstances).

In Oklahoma, the jury also is not required to impose a death sentence if the aggravating circumstances outweigh the mitigating circumstances. In the present case the jury was instructed as follows:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a

> reasonable doubt, you would be authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In the event, the sentence must be imprisonment for life.

(R. 209) (Emphasis added.)

This is consistent with Oklahoma law. In Parks v. State, 651 P.2d 686, 694 (Okla. Crim. App. 1982) it was stated:

> As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life.

See also Oklahoma Uniform Jury Instructions (Criminal) 437. Furthermore, under Oklahoma law in effect at that time, the Oklahoma Court of Criminal Appeals conducted a statutorily required

proportionality review, which was considered to be important in another Fifth Circuit case involving Louisiana's capital punishment scheme. Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984).

The second basis in the Wilson v. Butler, opinion for the court's statement that the jury in Louisiana does not weigh aggravating circumstances and mitigating circumstances in three Louisiana cases. 813 F.2d at 674, n. 36. Perusal of two of the cases, however, reveal that they hold only that a defendant is not entitled to an instruction that the jury should recommend the death sentence only if the aggravating factors outweigh the mitigating factors. See State v. Jones, 474 So.2d 919, 932 (La. 1985); and State v. Welcome, 458 So.2d 1235, 1246-47 (La.

1983). The third case, Sawyer v. State, 442 So.2d 1136, 1137-39 (La. 1983) merely states that nothing in Louisiana's statutory scheme requires that the jury must find the existence of at least one statutorily aggravating circumstance before the defendant can be sentenced to death. Significantly, the court noted that "the finding of statutory aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." (Emphasis original) (footnote omitted). Id. at 1139. Cf. State v. Flowers, 441 So.2d 707, 716-17 (La. 1983) ("[h]aving found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance so found, before

recommending that the sentence of death can be imposed.") (Emphasis added.)

Therefore, contrary to the Fifth Circuit's statement in Wilson v. Butler, under Louisiana law the jury does weigh the aggravating against the mitigating circumstances in capital cases. Williams v. Maggio, 679 F.2d 381, 389 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (en banc opinion involving Louisiana capital case where Fifth Circuit noted that "[w]hen one or more of the statutory aggravating circumstances is found, the jury must balance this against the mitigating circumstances offered by defendant."). For this reason, since the Fifth Circuit has upheld Louisiana death sentences where one of the aggravating circumstances has been found to be invalid, the Fifth Circuit rule is at

odds with the holding of the Tenth Circuit in the present case.

The interchangability of the words "consider" and "weigh" with regard to a jury's measuring one against the other in deciding whether to impose the death sentence demonstrates that the alleged difference between Georgia, Louisiana, and Oklahoma's death penalty schemes are really distinctions without a difference. Under Georgia law the jury is required to consider "any mitigating circumstances" Ga. Code Ann. § 17-10-30 (1982). Since "[t]he sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances . . . ." Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), supplemented, 722 F.2d 629 (11th Cir. 1984), cert. denied, 465 U.S. 1084

(1984), Georgia juries obviously perform a weighing process. Furthermore, the Constitution would be violated if the sentencer were precluded from considering mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). Therefore, these juries obviously weigh mitigating circumstances against the aggravating circumstance[s] they have found.

As noted previously, under Oklahoma law the jury in the present case was neither limited by enumerated mitigating circumstances, nor was it required to impose the death sentence upon the finding of one or more aggravating circumstance. Therefore, the alleged invalidity of one aggravating circumstance should not affect the death sentence since another one was found by

the jury. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (only one overbroad aggravating circumstance was found by the jury).

CONCLUSION

For the reasons stated, the State respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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